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Article

New VAT Rules for E-Commerce: The Final Countdown Has Begun

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In 2021, the VAT rules for e-commerce will change. As a result, virtually all supplies of goods to private individuals will be subject to VAT in the EU Member State of arrival of the goods. The declaration of VAT on distance sales of goods originating from third countries or third territories will be simplified under the Import One-Stop-Shop (I-OSS). It is also possible to make use of an exemption on import under that scheme. This simplified scheme will be attractive to both honest traders and fraudsters. In this contribution Madeleine Merkx examines the complications of this new system.

Keywords: E-commerce, distance selling, VAT, customs, one stop shop, importation, platform, liability, customs controls, fraud

1 Introduction

Within a year new VAT rules for e-commerce will enter into force.[1] As of 1 January 2021[2] virtually[3] all distance sales of goods by businesses (established within the EU and in non-EU countries) to consumers in the EU will be subject to VAT in the EU Member State of destination. As regards goods originating from third countries or third territories[4] the additional administrative burden on both customs and tax authorities as well as businesses will increase significantly due to the abolition of the exemption for small consignments. It therefore comes as no surprise that the EU has opted for two simplifications to deal with the reporting of VAT on imports, as well as the VAT on supplies of the goods that will be subject to VAT in the EU Member State of destination. A new special regime (the new section 4 of Chapter 6 of Title XII of Directive 2006/112/EC, hereinafter: 'VAT Directive') allows for reporting of the VAT on supplies through one EU Member State.[5] At the same time that special regime allows for an exemption for the import VAT. If the special regime is not used, VAT must be declared on the import and – if there is an importation into an EU Member State different from the EU Member State of destination – a supply that is subject to VAT in the country of arrival of the goods, too. For reporting the import VAT a special arrangement can be used that allows for a deferred declaration and payment of VAT (the new chapter 7 of Title XII, VAT Directive). This special arrangement can only be used in case the goods remain in the EU Member State of importation. Both the special regime and the special arrangement can only be applied if the goods have an intrinsic value of no more than 150 euros. In case goods have an intrinsic value of more than 150 euro the goods will be subject to customs duties. Consequently, a special regime for VAT purposes can no longer be applicable and normal customs procedures will have to be applied.

Because of the exemption and the single window for reporting VAT on distance sales of goods originating from third countries or third territories, a widespread

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1 Council Directive (EU) 2017/2455 of 5 Dec. 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, OJ L 348, 29 Dec. 2017, at 7–22.

2 The author notes that the European Commission has proposed to postpone the entry into force of the new VAT e-commerce rules until 1 July 2021 because of the COVID-19 pandemic (Proposal for a Council decision amending Directives (EU) 2017/2455 and (EU) 2019/1995 as regards the dates of transposition and application due to the outbreak of the COVID-19 crisis, COM (2020), 198, Proposal for a Council Regulation amending Regulation (EU) 2017/2454 as regards the dates of application due to the outbreak of the COVID-19 crisis, COM (2020) 201 and Proposal for a Council Implementing Regulation amending Implementing Regulation (EU) 2019/2026 as regards the dates of application due to the outbreak of the COVID-19 crisis, COM (2020) 199). The author expects that the EU Member States will agree with this proposal. However when closing the manuscript for this article this was yet unclear. The author therefore uses 1 Jan. 2021 as the date on which the new rules will enter into force.

3 There is a simplification for small entrepreneurs that still allows for paying VAT in the country of departure of the goods for distance sales within the EU, i.e. where the place of departure and place of arrival of the goods are in two separate EU Member States.

4 Third territories refers to territories of the EU that are part of the EU's customs Union but not of the EU VAT territory. The author refers to Art. 6 VAT Directive.

5 In case of EU established suppliers: the EU Member State of establishment. In case of non-EU suppliers: an EU Member State of choice or in case the non-EU supplier can only use the scheme through an EU intermediary: the EU Member State where the intermediary is established. The author refers to Art. 369m VAT Directive that described which taxable persons are eligible to use the special regime under what conditions.

use of the special regime (Import One-Stop-Shop, hereinafter: 'I-OSS') can be expected. Even though the I-OSS has been criticized[6] the objectives are obvious. By allowing an exemption at import the customs authorities will, for VAT purposes,[7] be relieved of any controls beyond checking whether a correct I-OSS number has been reported and verifying whether the value of the goods does not exceed the 150 euros threshold.

In this article the author addresses the distance sales of goods imported from third countries or third territories and the functioning of the I-OSS. She provides a critical view on complications regarding the I-OSS. It should be noted that the European Commission expects that new VAT rules will lead to more VAT income for EU Member States and will contribute to a more level playing field between EU businesses and non-EU business as desired by the European Commission and EU Member States.[8] The author, however, feels it still remains to be seen to what extent.

In section 2 and 3 of this article the author will explain the current and future VAT rules for distance sales with goods originating from third countries or third territories, respectively. Subsequently, she will address the exchange of information in respect of the I-OSS and the relevant customs legislation in sections 4 and 5, respectively. In section 6 she will describe the complications of the I-OSS. In section 7 she will conclude the article with some final remarks.

2 Current legislation for VAT e-commerce transactions

When goods from outside the EU are sold to private individuals (Business-to-Consumer, or 'B2C') within the EU there are two relevant taxable events for VAT: a supply of goods and an importation. As a main rule a supply of goods is subject to VAT in the country where the transport or dispatch of the good starts (Article 32 first paragraph VAT Directive).[9] An exception to this main rule, however, applies in case the dispatch or transport of the goods begins in a third territory or third country. In that case both the place of supply by the importer designated or recognized under Article 201 VAT Directive as liable for payment of VAT and the place of any subsequent supply shall be deemed to be within the EU Member State of importation of the goods (Article 32 second paragraph VAT Directive). As an exception to this rule, if the goods are dispatched or transported from a third territory or a third country and imported by the supplier into an EU Member State other than that in which dispatch or transport of the goods to the customer ends, the supply will be subject to VAT in the EU Member State of destination in case the conditions for distance selling have been met. These conditions are: (1) the goods are transported or dispatched by or on behalf of the supplier, (2) the customer is a non-taxable person or a taxable person or non-taxable legal person whose intra-Community acquisitions are not subject to VAT, (3) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, and (4) a national monetary threshold is crossed. The threshold does not apply in case of excise goods (Article 34 VAT Directive) which will always be subject to VAT in the EU Member State of destination if conditions 1–3 have been met. Currently, there are no simplifications for reporting VAT on supplies of goods. As a result, a VAT registration will be necessary to report the VAT on distance sales.

VAT is due upon importation regardless of whether the importer qualifies as a taxable person. Article 30 VAT Directive defines importation of goods as the entry of goods in the EU that are not in free circulation. The taxable event importation includes the importation of goods that are in the customs union of the EU, but not in the VAT territory.[10] The importation is subject to VAT in the EU Member State where the goods are located at the moment they enter the EU, Article 60 VAT Directive. However, in case goods are placed under a customs arrangement or under temporary importation arrangements with total exemption from import duty or under external transit arrangements, the place of importation will be the place where the goods cease to be covered by those arrangements, Article 61 VAT Directive. In the latter case the payment of import VAT is also postponed until that moment, Article 71 VAT Directive. In any other case VAT becomes chargeable at the moment goods are imported, Article 70 VAT Directive. Article 211 VAT Directive allows EU Member States to implement a deferred payment of import VAT. In that case VAT is not due upon importation, but in a later VAT return to be filed by the taxable person. Since this article focusses on the I-OSS and not on deferred payment of import VAT, the author will not further elaborate on this topic.

[6] M. M. W. D. Merkx, *Nieuwe plannen voor BTW en e-commerce: eenvoudig, neutraal en minder verlies aan belastinginkomsten?* (*New Plans for VAT and E-Commerce: Simple, Neutral and Less Loss of Tax Income?*) WFR 2017/59, Marie Lamensch, *European Commission's New Package of Proposals on E-Commerce: A Critical Assessment*, 28 (2) Int'l VAT Monitor 137–146 (2017), M. M. W. D. Merkx, *Nieuwe btw-regels voor e-commerce* (*New VAT rules for E-Commerce*), WFR 2018/146, Marie Lamensch, *Rendering Platforms Liable to Collect and Pay VAT on B2C Imports: A Silver Bullet?*, 29(2) Int'l VAT Monitor 48–49 (2018) and D. B. Middelburg, *Nieuwe btw-regels voor ingevoerde goederen* (*New VAT Rules for Imported Goods*), WFR 2020/19.

[7] Other legislation and security and safety reasons may still require checks.

[8] Expressed by the European Commission on p. 2 of the explanatory memorandum of the Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, COM(2016) 757 final.

[9] In case the goods are not transported or dispatched in relation to the supply, the place of supply is where the goods are located at the time when the supply takes place (Art. 31 VAT Directive).

[10] *See* Art. 6 VAT Directive.

The taxable event of importation can be VAT exempt. In respect of e-commerce two exemptions are important to discuss:

(1) The exemption for small consignments. Under this exemption EU Member States will exempt the importation of goods with a value of no more than 10 euros. EU Member States can increase the exemption by exempting goods with a value up to 22 euros.[11] The exemption also applies in the case of group shipments, where the goods already contain the name and address of the person for whom they are intended, but are sent to customs together with other shipments, while the value of the total of the shipments exceeds the amount of 22 euros, but that of the individual shipment does not.[12]
(2) An exemption for shipments from private individuals to other private individuals, provided that the commercial nature is absent and the value of the goods is no more than 45 euros. The shipment must have an incidental character, contain only goods intended for personal use by the addressee or members of his family and no payment is required for the shipment.[13]

The following four examples (which will also be used in section 3 of this article) show the VAT implications of the current VAT legislation in case of B2C e-commerce. In each case, C is a consumer living in Spain, and B is an American webshop supplying a product to C:

(1) *The product is imported in Spain by a postal carrier in the name of C.*
(2) *The product is imported in Spain by and in the name of B.*
(3) *The product is imported in France by a postal carrier in the name of C, and subsequently transported to C in Spain.*
(4) *The product is imported in France by and in the name of B, and subsequently transported to C in Spain.*

Example 1

Because the product is imported in the name of C the exceptions to the main place of supply rule do not apply (they apply only if the product is imported by the supplier B). This means that the supply of the product to C is not subject to VAT in the EU. C needs to pay Spanish import VAT at the moment the product is imported in Spain. The postal carrier will pay this VAT on his behalf and collect it from C. However if the product has a value that does not exceed 22 euros the import is not subject to VAT.

Example 2

Since in this situation the product is imported in Spain by B, its supply will be subject to VAT in Spain. This means that B must charge Spanish VAT to C and also needs to pay VAT on the importation of the product. This import VAT will be deductible because of the subsequent taxable supply to C. If the parcel contains the name and address of C, the supplier B can also apply the exemption for small consignements if the value of the supply is less than 22 euros.

Example 3

Because the product is imported in the name of C, the exceptions to the main place of supply rule do not apply. This means that the supply of the product is not subject to VAT in the EU. C needs to pay French import VAT at the moment the product is imported in France. The postal carrier will pay this VAT on behalf of C and collect the VAT from C. If the value of the supply is less than 22 euros the import is not subject to VAT.

Example 4

In this case the supply will in principle be subject to VAT in France, where B must also pay import VAT. He can deduct the French import VAT paid by him. If the parcel contains the name and address of C, the supplier B can also apply the exemption for small consignments if the value of the supply is less than 22 euros. However, in case the conditions for distance selling are met, including exceeding the local threshold, the supplier must pay VAT in Spain where the transport of the product to the consumer C ends.

3 New legislation for VAT e-commerce transactions

Under the new legislation entering into force in 2021 the exemption for small consignments will be abolished (Article 3 of Directive 2017/2455[14]). Next to this, the distance selling rules will be extended. The thresholds will be abolished and the scope of the rules extended. The distance selling rule will apply regardless of whether goods are imported in the name of the private person or the supplier in case goods are imported in an EU Member State different than the EU Member State of destination of the goods (the new Article 33 VAT Directive). The distance selling rule will also apply in case the supplier indirectly intervenes in the transport.[15]

[11] Articles 23 and 24 of Directive 2009/132/EC, OJ L 292, 10 Nov. 2009, at 5–30.
[12] CJEU 2 July 2009, C-7/08 (*Har Vaesen Douane Service*), ECLI:EU:C:2009:417.
[13] Articles 25 and 26 of Council Regulation (EC) No 1186/2009 of 16 Nov. 2009 setting up a Community system of reliefs from customs duty, OJ L 324, 10 Dec. 2009, at 23–57.

[14] *Supra* n. 1.
[15] The new Art. 5a VAT Implementing Regulation explains the transport requirement as follows:
Goods shall be considered to have been dispatched or transported by or on behalf of the supplier, including where the supplier intervenes indirectly in the dispatch or transport of the goods, in particular in the following cases:
(a) where the dispatch or transport of the goods is subcontracted by the supplier to a third party who delivers the goods to the customer;
(b) where the dispatch or transport of the goods is provided by a third party but the supplier bears either the total or partial responsibility for the delivery of the goods to the customer;

For the examples discussed in section 2 the new rules will have the following effect:

Example 1

As the product is imported in the name of C, the main place of supply rule applies which states that VAT will be due in the country of departure (i.e. not in the EU). Because the product is imported in the EU country of destination (Spain) the distance selling rules of Article 33 VAT Directive will not apply. C needs to pay Spanish VAT upon importation of the product. The postal carrier will pay this VAT and collect it from C. As the exemption for small consignments is abolished, C will need to pay this VAT.

Example 2

The new VAT rules do not change the present VAT consequences in this example.

This means that B must charge Spanish VAT to C and also needs to pay VAT on the importation of the product. This import VAT will be deductible because of the subsequent taxable supply to C.

Example 3

As the product is imported in an EU Member State (France) different from the EU Member State of destination (Spain), the distance selling rule of Article 33 (b) VAT Directive will apply. This means that the supply by B will be subject to Spanish VAT. C also needs to pay French VAT upon importation. The postal carrier will pay this VAT and collect it from C. As discussed later in this section, the I-OSS deals with this double taxation.

Example 4

Again, as the goods are imported in an EU Member State (France) different from the EU Member State of destination (Spain), the distance selling rule of Article 33 (b) VAT Directive will apply. This means that the supply by B will be subject to Spanish VAT. B will also need to pay French VAT upon importation. This VAT can be deducted, because of the taxable supply to C.

Without any additional measures VAT would need to be paid upon importation, customs authorities must process each parcel to collect this VAT and tax payers that import goods in an EU Member State different from the EU Member State of destination must register for VAT in the latter EU Member State to report VAT on the supply. It therefore comes as no surprise that additional measures have been implemented. Under the import OSS or simply I-OSS rules taxpayers can report all VAT due on distance sales in the EU through one single point of registration.[16] What's more, under I-OSS, by presenting to the customs authorities a special number, appointed to the taxpayer reporting supplies under I-OSS, an exemption for import VAT is granted (the new Article 143 (1) (ca) VAT Directive). It should be noted that this number can be presented to customs by any person importing the goods. It is important to mention that I-OSS is an optional system.

Electronic interfaces such as marketplaces, platforms, portals or similar means[17] ('platforms') have a special position within the new rules. For certain distance sales these platforms are deemed to supply goods to consumers. The actual supplier is deemed to supply those goods to the platform. This fiction applies in case the platform facilitates the following supplies:

(1) Distance sales originating from third countries or third territories with an intrinsic value of no more than 150 euros.
(2) Distance sales and local sales within the EU if the supplier is established outside the EU (the new Article 14a VAT Directive).

In this article the author will only address the first situation considering this article focusses on sales originating from third countries or third territories. Because in this case the goods are most likely imported in the name of the supplier or consumer (and not the platform) while the platform will be the one reporting the supplies under I-OSS, the platform will need to provide the supplier, the customer or the transporter or carrier with its I-OSS number. This obligation will be addressed further in section 6.2.2. The following example will show how the deeming provision for platforms works.

Example

Let's assume that C from example 2 (living in Spain) orders the product through a platform operated by a Spanish company P. If P facilitates the supply, P is deemed to supply the goods to C, and B (the American webshop) is deemed to

(c) where the supplier invoices and collects the transport fees from the customer and further remits them to a third party who will arrange the dispatch or transport of the goods;
(d) where the supplier promotes by any means the delivery services of a third party to the customer, puts the customer and a third party in contact or otherwise provides to a third party the information needed for the delivery of the goods to the consumer. However, goods shall not be considered to have been dispatched or transported by or on behalf of the supplier where the customer transports the goods himself or where the customer arranges the delivery of the goods with a third person and the supplier does not intervene directly or indirectly to provide or to help organize the dispatch or transport of those goods.

[16] This is called the Member State of identification. The new Art. 369l VAT Directive defines the Member State of Identification as:
(a) where the taxable person is not established in the Community, the Member State in which he chooses to register;
(b) where the taxable person has established his business outside the Community but has one or more fixed establishments therein, the Member State with a fixed establishment where the taxable person indicates he will make use of this special scheme;
(c) where the taxable person has established his business in a Member State, that Member State;
(d) where the intermediary has established his business in a Member State, that Member State;
(e) where the intermediary has established his business outside the Community but has one or more fixed establishments therein, the Member State with a fixed establishment where the intermediary indicates he will make use of this special scheme.

[17] These concepts are not defined in the VAT Directive or VAT Implementing Regulation. The expectation of the author is that these concepts will be defined in forthcoming explanatory notes of the Directorate-General for Taxation and Customs Union. Marketplaces are businesses like Amazon, Alibaba and eBay that connect suppliers and buyers of goods.

supply the goods to P. The transport is always ascribed to the supply by P (the new Article 36a VAT Directive[18]*). This supply will qualify as distance sale that P can report under the I-OSS. In order to obtain an exemption upon importation, B must provide the Spanish customs authorities with the I-OSS number of P. One can argue that the supply from B to P will be subject to VAT in Spain under Article 32 second sentence VAT Directive, because B is the importer and the importer's supply is subject to VAT in the Member State of importation. In case Spain has implemented a reverse charge rule for the supply of goods, this VAT can be reverse charged to P, the Spanish platform. However, one can also argue that Article 31 VAT Directive applies here. Because the transport is ascribed to the supply from P to C, the supply from B to P should be regarded as a supply without transport to which Article 31 VAT Directive applies. In that case the supply from B to the P is not subject to VAT in the EU.*

4 The exchange of information under I-OSS

Through an addition to Article 17 of Regulation 904/2010/EC EU Member States will share information regarding the I-OSS.[19] This includes:

- Information provided by the taxable person or intermediary about the commencement, cessation or change of the activity that makes the taxable person no longer eligible to use the scheme (new Article 369o VAT Directive)
- Information that the taxable person provides when commencing the use of the scheme, which includes its name, postal address, electronic address and websites and VAT identification number or tax number. In case an intermediary is used the intermediary must provide this information about himself and the person he represents. In case of changes these changes need to be reported as well (new Article 369p VAT Directive).
- The information included in the VAT returns filed (new Article 369s VAT Directive). This includes for each Member State where VAT is due: the total value of the goods excluding VAT, the applicable VAT rate, the VAT due per rate and the total VAT due (new Article 369t first paragraph VAT Directive).
- Information regarding amendments of the VAT returns (new Article 369t second paragraph VAT Directive)
- Data on the VAT identification numbers issued under the I-OSS and per VAT identification number: the total value of the imports of goods exempted under Article 143(1), (ca) VAT Directive, during each month.

5 Customs controls and I-OSS

In this section the relevant customs procedures will be addressed in case the goods are put into free circulation in the EU. When the goods enter the customs territory of the Union, they must be presented to customs. A summary entry declaration must be made prior to presenting goods to customs, Article 127 of the Union Customs Code (hereinafter: 'UCC') and Article 105 Delegated Regulation UCC.[20] The summary declaration contains the information required for a risk analysis for safety purposes, Article 127 (5) UCC. The summary declaration has no tax consequences, but is a condition for subsequently placing the goods under a customs procedure. Customs authorities may grant exemption from making a summary declaration if a customs declaration has been submitted before the deadline for submitting the summary declaration. When entering the customs territory the goods are put under the customs regulation temporary storage, Article 144 UCC. This temporary storage must be terminated within ninety days by placing goods under a customs procedure or by re-exporting the goods, Article 149 UCC. In case goods are intended for consumers in the EU the goods will be released for free circulation. This customs procedure results in a customs debt on importation Article 77 (1) UCC. The declarant is the debtor. This is the person who has made the declaration in his own name or in case of direct representation had someone else make the declaration in his name. In the event of indirect representation, the declaration is made in the name of the representative. In that case both the representative and his client are debtors, Article 77 (3) UCC. Anyone who is established or has a permanent establishment in the customs territory of the Union and can present the goods to customs including the necessary documents can make a declaration, Article 170 UCC. Article 77 (3) UCC also stipulates that in the situation in which the customs declaration is drawn up on the basis of information which leads to all or part of the import duty not being collected, the person who provided the information required to draw up the declaration and who knew, or who ought reasonably to have known, that such information was false shall also be a debtor.

Within the field of B2C e-commerce returned goods are common. Once imported the goods may remain within the EU and are either destroyed or supplied to a

[18] Council Directive (EU) 2019/1995 of 21 Nov. 2019 amending Directive 2006/112/EC as regards provisions relating to distance sales of goods and certain domestic supplies of goods, OJ L 310, 2 Dec. 2019, at 1–5.

[19] Council Regulation (EU) 2017/2454 of 5 Dec. 2017 amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax OJ L 348, 29 Dec. 2017, at 1–6.

[20] Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, OJ L 343, 29 Dec. 2015, at 1–557.

different consumer or business later on. When the goods leave the EU again, it should be noted that those goods lose their status as Union goods, Article 154 UCC. This means that if they are re-imported, import duties and VAT may be due again. There is no right to a refund of import duties or VAT when the goods leave the EU. Import VAT on returned goods can be deducted by the supplier.

Checks are carried out by customs authorities on the basis of a risk analysis, Article 46 (2) UCC. Common criteria and standards for risk analysis exist at EU level. However, the criteria and standards are not made public. Armella[21] describes both objective and subjective indicators within this risk analysis. A subjective indicator is the background of the economic operator. Objective indicators are: the type of goods, the country of origin, the place of departure and arrival and the tax treatment.[22] We should be aware that customs controls are not only used to ensure that taxes are collected correctly, but that they also relate to safety, for example. The results of a risk analysis can be four-fold: no check, document check,[23] scanner check and goods inspection. Reliable taxpayers, so-called Authorized Economic Operators or AEOs, receive more favourable treatment during controls. This includes fewer physical checks and fewer document based checks.

Based on their tax treatment – no import duties and no VAT – goods imported under the I-OSS will most likely receive limited attention from customs authorities. Customs authorities will check the I-OSS number used and the value of the goods: whether the value does not exceed 150 euros. In case the I-OSS is used the importer can use a limited dataset to file the customs declaration.[24]

6 Benefits and complications of the I-OSS system

6.1 Benefits and Force of Attraction

The I-OSS will obviously have a force of attraction to both honest businesses and fraudsters. For honest businesses because it provides the benefit of an exemption upon importation and the opportunity to report and pay VAT on distance sales in one Member State. For fraudsters the I-OSS is attractive because of the exemption. This will be further addressed in section 6.2.2. For customs authorities the I-OSS has benefits too. Due to the exemption customs authorities can give low priority to these shipments and direct their valuable resources to other imports of goods.

6.2 Complications of the I-OSS System

There are, however, some complications to consider when it comes to the functioning of the I-OSS. In this section issues regarding the scope of the I-OSS, the risk of fraud and controls and the risk of double taxation will be addressed.

6.2.1 Scope of the I-OSS

The I-OSS can be used to report and pay the VAT on distance sales of goods from third countries or third territories with an intrinsic value of no more than 150 euros. In case the goods have a value of more than 150 euros the I-OSS cannot be used. The 150 euros threshold is related to the relief from customs duties under Article 23 of Regulation 1186/2009.[25] Below the amount of 150 euros a customs debt will only consist of a VAT debt if I-OSS is not used. When goods have a value of more than 150 euros, VAT and customs duties need to be paid. When it comes to reporting the supplies this will require a VAT registration of the supplier (or platform) in each EU Member State where customers that purchase the goods are located (assuming the EU Member State of destination equals the EU Member State where the customer is located). The existing One Stop Shop (Union Scheme) that is extended to cover EU distance sales cannot be used to report these sales, because it only applies to EU distance sales. This fact may provide an incentive for undervaluation when goods are (just a little) over the 150 euros threshold.

It should also be noted that the I-OSS does not cover excise goods. Under Article 23 of Regulation 1186/2009/EC goods of negligible value (no more than 150 euro) are admitted free of import duties. The relief does not apply to alcoholic products, perfumes and toilet waters and tobacco or tobacco products under Article 24 of the same regulation. For VAT, however, the supply of excise goods qualifies as a distance sale. The exclusion of excise goods from the I-OSS therefore may result in multiple VAT registrations of a supplier to report the VAT due on the supply of these excise goods. Excise duties are due in case of production, extraction or importation in the EU, according to Article 2 Excise Directive.[26] The chargeability of excise duties is, however, suspended until the moment of release for consumption. Release for consumption includes: the departure of excise goods from a duty suspension arrangement, the holding of excise

[21] Sara Armella, *EU Customs Code* (Bocconi University Press 2017), p. 87 and 88.

[22] Sara Armella, *EU Customs Code* (Bocconi University Press 2017), p. 87.

[23] This checks whether the information in the declaration corresponds with the documents provided.

[24] Commission Delegated Regulation (EU) 2019/1143 of 14 Mar. 2019 amending Delegated Regulation (EU) 2015/2446 as regards the declaration of certain low-value consignments, OJ L 181, 5 July 2019, at 2–12.

[25] Council Regulation (EC) No 1186/2009 of 16 Nov. 2009 setting up a Community system of reliefs from customs duty, OJ L 324, 10 Dec. 2009, at 23–57.

[26] Council Directive 2008/118/EC of 16 Dec. 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, OJ L 9, 14 Jan. 2009, at 12–30.

goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation, the production of excise goods outside a duty suspension arrangement and the importation of excise goods, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement, Article 7 Excise directive.[27] The latter situation shows that in case of importation excise duties must be paid immediately unless the goods are put under a duty suspension arrangement, in which case the excise duties must be paid when the goods departure the duty suspension arrangement. In case excise duties are due upon importation the person who declares the excise goods or on whose behalf they are declared upon importation is the debtor, Article 8 (1) (d) Excise directive.

In case of excise goods there are, therefore, two reasons for a different treatment (1) the relief for customs duties does not apply and (2) the importation of excise goods gives rise to payment of excise duties. Excise duties will also be part of the taxable amount of the importation under Article 86 (1) (a) VAT Directive.

It should be further noted that the I-OSS cannot be used in case the goods are put in a warehouse in the EU under a customs suspensions regime and the goods are supplied from that warehouse to private customers in other EU Member States. Following the CJEU judgment in the Profitube case,[28] these goods are in the EU territory and the supply will meet the conditions of an intra-Community distance sale as defined by Article 14 (4) (1) VAT Directive, the condition being that goods are transported from one EU Member State to another. The supply does not meet the requirement of goods being sent from a third country or territory to a customer in an EU Member State. Intra-Community distance sales cannot be reported under I-OSS. Instead, another simplified reporting scheme can be used: the current Union scheme under the Mini One Stop Shop (MOSS) will be extended as of 2021 to cover these supplies (section 3 of chapter 6 of Title XII). As I-OSS does not apply, the importer cannot claim the exemption under the new Article 143 (1) (ca) VAT Directive at the moment the suspension regime is ended and the goods are released for free circulation. Whether the rules for intra-Community distance sales or distance sales of goods from third countries or third territories apply, therefore depends on where the goods are located at the moment the transport in relation to the purchase starts. From the Fonderie case[29] it becomes clear that there must be a sufficient temporal and material link between the supply and the dispatch of the goods as well as continuity in the course of the transaction. Such a link and such continuity are lacking in case the goods are sent to a service provider for the purpose of processing the goods before they are delivered to the customer. In that case the place of dispatch is the place where the goods are located at the moment they become compliant with the contractual obligations between the supplier and the customer.

By excluding both goods with a value of more than 150 euros and excise goods from the I-OSS the EU creates an extra administrative burden for honest businesses. Suppliers (or platforms) will need to register and pay VAT in each EU Member State where their customers are located. What's more, fraudsters may undervalue goods to benefit from the exemption under I-OSS or excise goods may be labelled as other goods. In the author's view, customs controls do not require an exclusion from reporting VAT on supplies through one single point of registration. Customs authorities need to check the value of the goods and whether it concerns excise goods anyway, because customs duties – and in case of excise goods – excises may be due.

In the author's view it seems feasible to open up the I-OSS to report the VAT on these distance sales as well, but without the exemption. The only reason for not doing so, is that this would create two separate regimes under I-OSS. To avoid two regimes under I-OSS while at the same time providing a simplified reporting of VAT on these types of distance sales, the simplified reporting scheme that applies to intra EU distance sales could be considered. As of 2021 this Union scheme already applies to three types of supplies: B2C services of EU suppliers, EU distance sales of both EU and non-EU suppliers and local supplies of goods in case a platform is liable for the VAT on such a supply based on the provision of Article 14a VAT Directive (see section 3). What's more, when these goods are imported in the EU, VAT is paid upon importation and the supplier is in a similar position compared to the supplier who has imported the goods for example three months ago (or has stored those goods in a customs warehouse). The latter supplier can report intra EU distance sales through one single point of registration while the first supplier cannot and must have several VAT registrations.

6.2.2 Risk of Fraud and Controls

The I-OSS, in my view, entails a risk that fraudsters will use the exemption, but not report the VAT due on the distance sales. Lamensch addresses the fact that I-OSS numbers of big platforms like Amazon and eBay may be misused. As addressed above, in case the platform is liable to pay the VAT on the distance sales it will be the platform that uses I-OSS and has an I-OSS number, while it is the supplier or customer that imports the goods in its own name. In order to obtain the exemption the importer must provide customs authorities with the I-OSS number of the platform. Once provided to the

[27] Release for consumption includes also irregular release for consumption, e.g. theft. As theft does not fall within the definition of supply of goods, VAT is not due (*see* ECJ EU C-435/03 BATI Newman).

[28] CJEU 8 Nov. 2012, C-165/11, ECLI:EU:C:2012:692.

[29] CJEU 2 Oct. 2014, C-446/13, ECLI:EU:C:2014:2252.

importer it may misuse this number in case of direct sales (not through the platform) or even provide it to other sellers that seek to commit fraud.[30] Middelburg suggests a double check to prevent this type of fraud. Under this double check not only the I-OSS number but also a transaction number will be verified by customs authorities.[31] This ensures that the I-OSS number is used only in case the platform is indeed liable to pay the VAT on the distance sale. However, it does require an extra check by customs authorities. Because the fraud described is 'easy', we should, in my view, accept such an extra check. Under the currently envisaged situation platforms may opt not to use the I-OSS because of the risk that they will be held liable to pay the VAT on distance sales that have been imported under their I-OSS number. In that case importers will need to pay the VAT upon importation (and double taxation may occur (see section 6.2.3)) and customs authorities will need to process all shipments concerning sales facilitated by the platform.

The risk that the exemption is used while at the same time the distance sales are not being reported can be mitigated in case of sufficient controls. As described in section 4, the tax authorities of the EU Member States will provide information to a database about the identity of the taxable persons registered under I-OSS, information included in the VAT returns filed under I-OSS, the I-OSS numbers and per I-OSS number the total value of the imports of goods exempted under the new Article 143(1) (ca) VAT Directive, during each month. This information should allow tax authorities to compare the I-OSS VAT returns with the imports. Lamensch points out that this does not deal with an undervaluation of goods. In case goods with a value of 50 euros are imported mentioning a value of 3 euros and the supply is also reported in the I-OSS VAT return for 3 euros this will not result in a 'mismatch'.[32] There are, in my view, three other complications when comparing the information: (1) the temporal aspect, (2) returned goods, and (3) the situation where the customer has concluded a transport contract with the transport company.

6.2.2.1 Temporal Aspect

In case the I-OSS is used the VAT on the distance sales will be due at the moment the payment is accepted. Normally, the payment is accepted before the goods are sent to the consumer. The moment the VAT is due on the supply therefore precedes the moment of importation. This, however, does not mean that the VAT on the supply has already been reported at the moment of importation. Under the I-OSS the tax period and the VAT return period are both one month. Tax authorities cannot simply compare an I-OSS VAT return with the imports in the same month.[33]

If, for instance a good is dispatched in March (after the customer confirmed the payment) whereas the import of the good takes place in March or April or May, a match between the supply and the import should be found by comparing the VAT return for March with information on imports in March or April or May. In the long run of course the imports and supplies reported should match. However, fraudsters tend to disappear before tax authorities will find out that these do not match (completely).

In my view, a system of real time reporting may help avoid this complication. In case of real time reporting taxpayers are required to report the supplies within a short period of time. VAT can also be collected at that point in time, but real time reporting can exist next to regular VAT returns.[34] Through this process tax and customs authorities already have information about the goods before they are imported. Upon importation they can check if the goods have been reported through the system of real time reporting. Using the transaction number mentioned earlier in this section, the tax authorities will be able to monitor compliance per transaction. One can also consider a system where a supply must be reported and approved by the customs and tax authorities before they are shipped to the customer.[35]

6.2.2.2 Returned Goods

Returned goods will also complicate finding a match between reported supplies and imported goods.[36] It is a well-known fact that goods that are sold over the internet are often returned. Within I-OSS returned goods are processed as corrections. Corrections are made in the next VAT return. In case goods are returned in the same month as the month in which the payment has been accepted, returned goods will not be visible at all, while at importation the exemption has been applied. In case the goods are returned in a later month the supply will have been reported and the correction has been made in a later tax period. However, if we take a longer period into account there will be a mismatch between the total taxable amount reported for goods that have been imported under the exemption and the total taxable amount of goods that are reported in I-OSS, because the returned goods will have been imported under the exemption, while they are – on balance – not reported in the I-OSS return. Returned goods are included in the books of the supplier, but this requires

[30] Lamensch (2018), *supra* n. 5, at 49.
[31] D. B. Middelburg, *Nieuwe btw-regels voor ingevoerde goederen* (*New VAT Rules for Imported Goods*), WFR 2020/19, s. 4.
[32] Lamensch (2018), *supra* n. 5, at 49.
[33] Compare *ibid.*
[34] As is currently the case in Spain.
[35] *See* e.g.: Richard T. Ainsworth & Goran Todorov, *DICE – Digital Invoice Customs Exchange*, Boston University School of Law Working Paper No. 13-40 (22 Aug. 2013).
[36] Compare Lamensch (2018), *supra* n. 5, at 49.

an extra check. What's more, returned goods are in the EU VAT free and could enter the black market.

In my view, real time reporting could also help here, because at least returned goods within the same tax period will be visible. One can also consider withdrawing the exemption with retrospective force in case of returned goods. This must take place within the framework of the VAT legislation. After goods are put in free circulation customs supervision has ended. In case of proven destruction of the goods VAT does not have to be paid. Even though the supplier will be able to deduct the import VAT due because of the withdrawal of the exemption, returned goods will be visible and goods and suppliers are traceable. This can prevent goods from entering the black market.

6.2.2.3 Customer Concludes Transport Agreement

Under the new definition of distance sales the transport requirement is also met in case the customer concludes a transport agreement, but the supplier has promoted the delivery services of this transporter to the consumer. In that case there will be a separate supply of services from the transport company to the consumer and the taxable amount for the supply of the goods will not include transport costs. However, the taxable amount for reporting the importation will include the transport costs pursuant to Article 86 (1) (b) VAT Directive. In this situation it will therefore not be possible to make an exact match between the taxable amount for which the exemption has been applied and the taxable amount reported under I-OSS. What's more, the consumer can obtain a financial benefit by concluding the transport agreement himself. The Federal Express Europe Inc. case,[37] in my view, shows that the exemption under Article 144 VAT Directive applies on the transport service even though the import is not effectively taxed because of the exemption under Article 143 (1) (ca) VAT Directive.

6.2.3 Double Taxation

Last but not least, I would like to mention that the I-OSS, that is intended as a simplification only, needs to be applied to avoid double taxation in case the goods are imported in the name of the consumer in an EU Member State different from the EU Member State of destination. In that case there will be a distance sale subject to VAT in the EU Member State of destination (see example 3 in section 3). This VAT needs to be reported and paid by the supplier, but will be charged to the consumer. Because the importation is done in the name of the customer he will need to pay import VAT in the EU Member State of importation too. Only in case the I-OSS is used the importation will be exempted. The I-OSS is, however, intended as a simplification and not as a rule that should avoid double taxation. In my view, this double taxation must be avoided in all cases and not only in case the I-OSS is used.[38]

7 Conclusion

In this article the author addressed the new VAT legislation for distance sales of goods from third countries and third territories, in particular the new simplified reporting scheme called I-OSS. There are still many complications regarding the I-OSS, while at the same time there are clear benefits of this scheme. The final countdown for these new rules has begun, while there is already room for improvement. This includes in the author's view in particular:

- Opening up the Union scheme under OSS for reporting sales originating from third countries and territories with a value of more than 150 euros and excise goods in the EU to avoid administrative burdens for honest businesses
- A double check by the customs authorities, i.e. the I-OSS number and a transaction number, to avoid fraud with I-OSS numbers.
- As regards controls there are three complications when comparing the information of the I-OSS VAT returns with the imports: (1) the temporal aspect, (2) returned goods and (3) the situation where the customer has concluded a transport contract with the transport company. A system of real time reporting may avoid the complication of the temporal aspect, while it can also make returned goods within the same tax period visible. One can also consider withdrawing the exemption for import VAT in case of returned goods.
- Double taxation should be avoided in all cases where the goods are imported in the name of the consumer in an EU Member State different from the Member State of destination and not only in cases the I-OSS is used. I-OSS is just a simplification

In the author's view this legislation is a first step in addressing VAT challenges of the digital economy, but certainly not the last.

[37] CJEU 4 Oct. 2017, C-273/16, ECLI:EU:C:2017:733.

[38] *See also* M. M. W. D. Merkx, *Nieuwe btw-regels voor e-commerce* (New VAT rules for e-commerce), WFR 2018/146, s. 4.